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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 614

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The Commercial National Bank of Kansas City and The Boatmen's National Bank of St. Louis, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit, which Court, on appeal from the judgment for Petitioners in the United States District Court for the District of Kansas holding the Frank E. Washburn Estate was entitled to a charitable deduction for a bequest in trust, reversed said judgment against Petitioners.

A timely Petition for Rehearing was filed but was denied by the Court of Appeals.

This suit involves a claim for refund of Estate Taxes unlawfully assessed by the United States Government but paid by Petitioners in the principal amount of $19,614.05.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F. 2d ....., and appears in the appendix to this Petition as Appendix A, page A1. Only pages 12 and 13 of the final opinion were revised. These unrevised pages appear also in Appendix A, pages A13-A15.

The petition for rehearing of Petitioners filed June 17, 1968, appears in the appendix to this Petition as Appendix B, page A15.

The judgment of the United States Court of Appeals to be reviewed was entered on the docket July 5, 1968, and appears in the appendix to this Petition as Appendix C, page A25.

The opinion of the United States District Court for the District of Kansas is reported in 265 F. Supp. 806 (1966) and appears in the appendix to this petition as Appendix D, page A27.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the determination made by the Court of Appeals for the Tenth Circuit which determination is in direct con-

flict with an earlier decision of this Court involving whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal by the trustees for the benefit of the life beneficiary. The allowance and disallowance of charitable deductions with respect to estate tax returns under instruments which create benefits for both charitable and private purposes have been disputed in the Courts throughout the Land for many years. The *Ithaca Trust Company* case has been cited at least once every three months for over thirty years. It appears that it is time for this Court to take up the matter and permanently resolve the issues which have resulted in numerous inconsistent decisions and have plagued the legal profession both in and out of Government over the decades.

Ithaca Trust Company v. *United States*, 279 U.S. 171.

United States v. *Powell*, 307 F. 2d 821 (1962, C.C.A. 10th).

In re Estate of Woods, 181 Kan. 271, 311 P. 2d 359.

Berry v. *Kuhl*, 174 F. 2d 565 (1949, C.C.A. 7th).

Revenue Ruling 54-285 Cumulative Bulletin 1954, Part II, Page 302.

Henslee v. *Union Planters Bank*, 335 U.S. 595.

Merchants National Bank of Boston v. *Commissioner of Internal Revenue*, 320 U.S. 256.

Gammons v. *Hassett*, 121 F. 2d 229, certiorari denied 314 U.S. 673.

Union Trust Co. v. *Tomlinson*, 355 F. 2d 40 (C.A. 5th).

2. The decision below of the Tenth Circuit conflicts, not only with applicable decisions of this Court, but with its

own decision (*Powell*) involving the interpretation of trust provisions governed by Kansas law that may or may not limit the invasion of principal to the standard-of-living criterion. Also the Tenth Circuit's decision is in conflict with *Lucas* v. *Mercantile Trust Co.*, 43 F. 2d 39, a decision by the Eighth Circuit decided July 30, 1930, wherein substantially the same question was presented by the governing instrument with respect to powers of invasion for the life beneficiary

United States v. *Powell*, 307 F. 2d 821.

In re Estate of Woods, 181 Kan. 271.

Lucas v. *Mercantile Trust Co.*, 43 F. 2d 39.

3. The Court of Appeals erred in dismissing Petitioner's Motion To Dismiss Appeal which motion was filed on the grounds that the Notice of Appeal by the United States was not filed within sixty (60) days from the date of the judgment appealed from in the District Court.

Blanchard v. *Commonwealth Oil Co.*, 294 F. 2d 834.

Carnes v. *United States*, 279 F. 2d 378.

United States v. *Wissahickon Tool Works*, 200 F. 2d 936.

County of Imperial, State of California v. *United States*, 384 F. 2d 904.

F. T. C. v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206.

United States v. *F. & M. Schafer Brewing Co.*, 78 S. Ct. 674.

STATEMENT OF THE MATTER INVOLVED

On June 19, 1954, Frank E. Washburn executed his will bequeathing his residuary estate to his wife, Lucy Tullock Washburn, or, if she failed to survive him, one-sixth each to four nephews and one-sixth each to the Cushing Memorial Hospital Corporation, of Leavenworth, Kansas, and to the University of Wisconsin.

Also on June 19, 1954, Mr. Washburn established a revocable trust the income from which was payable to himself during his lifetime, to his surviving spouse thereafter, but if she predeceased him or after her death, to his (Mr. Washburn's) sister, if she survived. The Trust Agreement provided that upon the death of the wife and the sister, or upon decedent's death if both predeceased him, the trust estate was to terminate and the net principal and net undistributed income remaining would go one-sixth each to four nephews and one-sixth each to the Cushing Memorial Hospital Corporation and to the University of Wisconsin.

Paragraph 5 of the aforementioned Trust Agreement provided (R-23):

> "5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit

for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement."

At the date of death of Frank E. Washburn, his surviving spouse, Lucy Tullock Washburn, had on deposit in her own revocable inter vivos trust at the Boatmen's National Bank of St. Louis, cashable income producing securities worth $533,000.00; cash on deposit at that bank of $15,000.00; immediately saleable government and municipal bonds worth $99,000.00; an immediate interest of $110,316.91 in her husband's estate; and real estate in her own name worth $39,500.00. At the date of her husband's death, Lucy Tullock Washburn, had an annual income of more than $29,000.00 consisting of $15,600.00 per year from her own trust at The Boatmen's National Bank of

St. Louis, $7,500.00 per year from the Frank E. Washburn Trust, more than $3,000.00 per year in interest income from government and municipal bonds, and approximately $3,000.00 per year starting at the date of his death on the $110,316.91 inherited from her husband. (R. 10-11, 41-42)

Prior to the death of the decedent, the living expenses of Mr. and Mrs. Washburn averaged about $21,000.00 per year of which the wife paid two-thirds and the husband paid one-third. From the date of death of Mr. Washburn through the date of death of Mrs. Washburn, some six years later, living expenses never exceeded $21,000.00 per year for Mrs. Washburn. Included in this $21,000.00 figure were taxes in the approximate amount of $10,000.00 per year and contributions to charities of about $750.00 per year. (R. 42)

A Federal Estate tax return was timely filed on behalf of the estate on June 25, 1958, disclosing an estate tax liability of $31,920.44, which sum was remitted with the return.

Upon subsequent audit of the return, a deficiency in tax of $39,212.04, together with interest of $7,508.30, a total of $46,720.34, was assessed and paid by the representatives of the estate. The deficiency was based on the disallowance of charitable deductions with respect to the remainder interests passing to the Cushing Memorial Hospital Corporation and the University of Wisconsin under the above-mentioned trust, and on several other adjustments which are no longer in controversy.

Following the payment of a refund by the Commissioner upon issues not relevant here, the estate's representatives on September 17, 1963 filed a second timely claim for refund in the amount of $19,614.05, which was

disallowed by statutory notice of disallowance dated December 16, 1963. An action was filed in the Federal District Court for the District of Kansas which resulted in a summary judgment in favor of the taxpayers. The District Court found from the undisputed facts that at the date of the decedent's death, his widow was possessed of a personal estate more than twice the size of that constituting the corpus of the Frank E. Washburn Trust; that the widow's estate alone produced income in excess of that required to maintain the widow's standard of living; that the size of her personal estate increased during the period between her husband's death and her own; that she received outright a bequest of better than $100,000.00 from her husband's estate; and that her standard of living was modest. The District Court further found that the possibility of invasion of the corpus by the Trustee was so unlikely as to be neglible. The United States appealed the decision of the District Court to the Tenth Circuit Court of Appeals which court reversed the lower court's decision and remanded the case for entry of judgment consistent with its opinion.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Whether this Court should grant certiorari to review the determination made by the Court of Appeals for the Tenth Circuit which is in direct conflict with an earlier decision of this court, the nature of the controversy being whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal by the trustees for the benefit of the life beneficiary.

The controlling legal decision applicable to the facts of this case was announced in *Ithaca Trust Company* v. *United States*, 279 U.S. 171, 49 S. Ct. 291, wherein this Court held that where a provision in the governing instrument contains a standard of living clause the charitable deduction is to be allowed if at the date of the decedent's death there is enough money in sight to continue that standard of living without invading the corpus of the trust estate. The Treasury Department has developed a ruling in accordance with the *Ithaca* holding, Revenue Ruling 54-285 Cumulative Bulletin 1954, Part II, Page 302, which recites that where there is an ascertainable standard governing comfort and support, the charitable deduction is allowed where the probability of invasion of the corpus is so remote as to be negligible. In the case at hand, the probability of invasion of the trust corpus is so remote as to be negligible in view of the surviving spouse's individual wealth, annual income and her living expenses.

In *Ithaca* the decedent gave to a corporate trustee the residue of his estate for the benefit of his wife for life with authority to use from the principal any sum *"that may be necessary to suitably maintain her in as much comfort as she now enjoys."* After the wife's death the remainder interests were to go to certain charities.

In this monumental decision this Court held that principal of the trust could be used for the wife, only if necessary and then only to continue the standard of living enjoyed at the time of decedent's death. It was also held that the standard was fixed in fact and capable of being stated in definite terms of money *AND IT was not left to the widow's discretion.* It was further determined that since funds were available to pay debts, specific legacies

and expenses of administration with sufficient amounts thereafter to maintain the widow as required, *there was no uncertainty appreciably greater than the general uncertainty that attends human affairs.*

From this it must be concluded that (1) if a standard exists, (2) there are adequate assets available, and (3) the discretion to invade is not in the widow but in one who must act in accordance with trustee standards, the Government bears no risk appreciably greater *than the general uncertainty that attends human affairs.*

There is no doubt but that the provisions of paragraph 5 of the Trust Agreement set out an ascertainable standard and the discretion to invade is *solely* in the Trustee. The widow was entitled to distributions from corpus only if she could show she was in need of funds to continue the standard of living she enjoyed at the time of her husband's death. In view of Mrs. Washburn's substantial estate in her own right, it is virtually inconceivable that an invasion of principal would ever have taken place for her benefit.

The United States relies heavily on two decisions of this Court to support its contention for disallowance of the charitable deduction. The first case, *Merchants National Bank of Boston* v. *Commissioner*, 320 U.S. 256, involved an instrument that permitted invasion of principal—

> "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the Trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this Trust."

In developing the question to be resolved, this Court determined that the case turned on whether the bequests to the charities had, as of the testator's death, a *presently ascertainable* value. In other words, whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately.

It was reasoned that the aforementioned provisions of the governing instrument were not restricted by a fixed standard based on the widow's prior way of life. (In *Ithaca*, of course, as in the case at hand, a definite standard is spelled out unequivocally.) From this it is obvious that a decision disallowing the charitable deduction was in order. The trustee was instructed to honor the wishes of the wife and without a standard to go by, it, of course, was readily discernible that the risk was on the Government, despite the fact the widow's previous mode of life was modest and her own resources substantial.

It is to be noted that this Court did discuss the widow's *happiness* as being a factor which the trustee had to consider in making any distributions. Such a word by itself, of course, could not be controlling with respect to allowance or disallowance of the deduction but when no standard has been provided as a guide, it then becomes apparent that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction. This would follow, it seems, irrespective of the words used, whether they be *happiness, benefit, enjoyment, welfare, etc.*

The second case on which the United States relies is *Henslee* v. *Union Planters National Bank & Trust Co.*, 69 S. Ct. 290. There the governing instrument left the decedent's estate to the bank in trust for his mother for life with the following provisions and directions to the trustees:

"I hereby direct both my executors and my Trustee to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Again we see a most noticeable absence of a standard as required by the *Ithaca* decision. This then throws the matter into the same area that *Merchants* covered. Without an ascertainable standard and with power to invade resting in the life beneficiary and the trustee being directed to cater to the whims of the life beneficiary, it is obvious that the remaindermen are not protected by strict trustee standards as in *Ithaca* and the risk is appreciably greater *than the general uncertainty that attends human affairs.*

This Court's determination in *Henslee* was again made on the absence of an acceptable standard. At 69 S. Ct. 292, it was stated:

". . . It is apparent on the face of the complaint that this testator's will did not limit the trustee's disburse-

ments to conformity with some ready standard—as where, for example, trustees are to provide the prime beneficiary with such sums as 'may be necessary to suitably maintain her in as much comfort *as she now enjoys.*' (Emphasis supplied.) Ithaca Trust Co. v. United States, 279 U.S. 151, 154, 49 S. Ct. 291, 73 L. Ed. 647. The stated income here directed to be paid to the mother was 'to be used by her as she sees fit.' Beyond this the trustees were empowered to invade or wholly utilize the corpus of the estate for the mother's 'pleasure, comfort, and welfare,' bearing in mind the testator's injunction that

> "The first object to be accomplished * * * is to take care of and provide for my mother in such manner as she may desire * * *." As in the Merchants National Bank of Boston case (320 U.S. 256, 64 S. Ct. 111), where the trustees have discretion to disburse sums for the "comfort, support, maintenance, and/or happiness" of the prime beneficiary, so here we think it the "salient fact * * * that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction." 320 U.S. 256, 262, 64 S. Ct. 108, 112, 88 L. Ed. 35.

Petitioners are cognizant of the fact that *Merchants* and *Henslee* are two cases decided by a divided Court and also go only to the extent that if the governing instrument fails to state an ascertainable standard, then the charitable deduction fails. The late Mr. Justice Frankfurter who reversed himself from the majority in *Merchants* to the dissenters in *Henslee*, stated—

> "Wisdom too often never comes, and so one ought not to reject it merely because it comes late. Since I now realize that I should have joined the Dissenters in the Merchants National Bank of Boston case, 320 U.S. 256, 64 S. Ct. 108, 88 L. Ed. 35, I shall not compound error by pushing that decision still farther. I

would affirm the judgment, substantially for the reasons given below, 6 Cir., 166 F. 2d 993."

Mr. Justice Minton, then Judge in the Circuit Court deciding *Berry* v. *Kuhl*, 174 F. 2d 565, after considering both lines of decisions stated the rule to be:

> "The charitable interest is deductible in full where the power of private beneficiary to invade the corpus is limited by a standard fixed by the terms of the Will and capable of being stated in terms of money and where the circumstances (resources) of the private beneficiary indicate possibility of invasion is remote.
>
> "Where, on the other hand, no measurable standard is fixed by the Will to limit the power of invasion, no deduction for the charitable interest will be allowed."

From this it is therefore obvious, that, as the decisions themselves hold, it is not the use of the word "happiness," or "desire," or "wishes" that is of bone crushing importance. No matter what the language is, the salient point as pointed out in *Merchants* and as restated by Mr. Justice Minton, is whether or not there is a living standard fixed in the governing instrument to measure what the Trustee may withdraw from corpus. It is to be noted that Justice Minton does not mention the words *happiness, desire, wishes* or the like, he speaks only of the presence or absence of a standard of living clause.

It is true that *Merchants, Henslee* and the others discuss the use of the words *happiness, pleasure, desire, wishes* and the like but then in the total absence of a standard of living clause there was simply nothing else to discuss. It seems correct to assume, after analyzing the *Merchants* line of cases, the result would necessarily have been the same, even if the words *happiness, pleas-*

ure, wishes or *desire* had not been used at all. In each of the cases the real or salient reason for the disallowance was the total absence of any standard by which the probable extent, if any, of invasion could be measured in money as was succinctly stated in *Berry*.

The *Ithaca* case has been epitomized by the United States Treasury Department in its Revenue Ruling 54-285, Cumulative Bulletin 1954 Part II, Page 302, which states as follows:

> "(1) There must be an ascertainable standard covering comfort and support which may be either express or implied, and
>
> (2) The probability of invasion is remote or the extent of the invasion is calculable in accordance with some ascertainable standard."

The decisions denying charitable deductions with respect to estate tax matters, are those having no standard of living clause. Such decisions are not relevant to this case.

The promulgation of this ruling must have been brought about in view of the problems presented in such cases as *Merchants* and *Henslee* and the forerunner of these two decisions, *Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U.S. 673. The will in the latter case, after payment of debts, specific bequests, etc., provided as follows:

> "1. All the rest, residue and remainder of my property, of whatever nature, and wherever situated, including all property over which I now have, or may hereafter acquire, the power of disposition, I give, devise and bequeath to my Trustees, in trust, nevertheless, for the following purposes: to be held by them, the income thereof, after paying all reasonable expenses of the trust, indulging a reasonable compen-

sation for the services of my Trustees, and so much of the principal thereof *as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life.*

* *

"3. I direct my said Trustees to transfer, make over and distribute the rest, residue and remainder of my estate to the New England Grenfell Association, of 25 Huntington Avenue, Boston, Massachusetts, and the Society for Prevention of Cruelty to Animals, of Boston, Massachusetts, share and share alike, free and discharged of any trust."

The question presented to the Court was whether the bequests to the charities were sufficiently definite and ascertainable as of the date of the death of the testator to be deductible from the gross estate.

In reasoning that the charitable gift was not definitely ascertainable at time of testator's death, the Court recognized the fact that the language of the will did not establish a standard required by *Ithaca*. The Court went on to state:

". . . The power to invade the principal is not restricted to the life tenant's needs; the widow may invade it as she desires. We know of no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires, so that we could place a definite value on the charitable bequests. While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain."

The Court in *Gammons* quoted from the *Ithaca* opinion in the course of making its points with respect to a *standard* and *widow's discretion*:

> "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion."

From *Gammons* and the other landmark decisions involving charitable deductions for remainder interests, the issues have necessarily revolved around (1) the ascertainable standard, (2) availability of assets and (3) the life beneficiary's power to invade to the detriment of the charities. In resolving such issues the Courts have found it necessary to interpret the governing instruments under the applicable state law, since state laws create legal interests and rights and the federal revenue acts designate what interests or rights, so created, shall be taxed. With this in mind and applying the Kansas law to the provisions of the instrument at hand, a second important factor for determination presents itself. The following question Number Two of Petitioners is indeed a valid one to bring the issue to the attention of this Court so that justice will prevail.

2. The decision of the Tenth Circuit conflicts, not only with applicable decisions of this Court, but with its own decision (*Powell*) involving the interpretation of the trust provisions governed by Kansas law that may or may not limit the invasion of principal to the standard of living criterion. Also the decision of the Tenth Circuit is in conflict with *Lucas* v. *Mercantile Trust Company*, 43 F. 2d 39, decided by the Eighth Circuit in 1930, wherein substantially the same question was presented by the governing instrument with respect to powers of invasion for the life beneficiary.

Considerable effort has been expended by the respondents in pressing for the application of Merchants

to the situation before us. And despite the fact the Tenth Circuit in its decision has unequivocally stated—

> "Thus our problem may be stated as whether, under the law of Kansas, Paragraph 5 of the trust limits the invasion of principal to the standard-of-living criterion."

it has based its decision on cases interpreting instruments governed by Massachusetts law and other jurisdictions. In this connection it must be stated that whatever may be the reach of the word *happiness* in a Massachusetts will (*Merchants*), which does not contain any semblance of a standard of living clause, the established law of Kansas is that in a Kansas will which does contain a standard of living clause, the use of the word *happiness* does not enlarge this standard. The controlling cases with respect to instruments governed by Kansas law is *In re Estate of Woods,* 181 Kan. 271 and *United States* v. *Powell,* 307 F. 2d 821.

The *Powell* case did not involve a charitable remainder deduction question as was first thought by the Tenth Circuit on page 12 of its original opinion. See Appendix A1, page A10. *Powell* involved an instrument containing a Power of Appointment provision as contemplated under Section 811 of the 1939 Internal Revenue Code, now Section 2041 of the 1954 Code. The instrument provided with respect to invasion by the Grantor for the benefit of the life tenants, as follows:

> "Fifth: If, at any time during the continuance of this trust, it is necessary or advisable to use *some portion of the principal for the maintenance, welfare, comfort, or happiness of the Grantor's wife,* * * * *or Grantor's daughters,* * * * or for the education of Grantor's said daughters, the Trustee is hereby authorized and empowered to use so much of the

> principal as in the discretion of the Trustee is necessary or advisable to be used to meet such conditions, and *provided that the Trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties.* * * *" (Emphasis added.)

In view of the foregoing provisions, the Government contended that a trust created by the decedent (Mr. Powell) some 22 years before his death was includible in his gross estate for Federal estate tax purposes. In creating the trust, Mr. Powell named himself as a joint trustee with certain powers that gave rise to the contention that for virtually all intents and purposes the retention of said powers made him (Mr. Powell) the equitable owner of the trust assets at his death and accordingly should be taxed pursuant to the provisions of the tax laws.

The *Merchants* case was discussed in the *Powell* decision. The opinion of the Tenth Circuit among other things stated with respect to this Court's decision in *Merchants*:

> "It is clear, we think, that the Court accorded such broader connotation to the word 'happiness,' because of the context in which it was found, and, particularly, the instructions to the Trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries."

The Tenth Circuit further reasoned that the *Powell* instrument not only did not provide that the power to invade the corpus should be exercised with liberality and to gratify the wishes of the beneficiaries, but, on the contrary, indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus. It accordingly concluded that the exercise

of discretion to invade the corpus with liberality and in accordance with the wishes of a beneficiary is not a power restricted by a fixed standard. Finally, with respect to the *power to invade corpus,* it was determined that there was nothing in the context of the Powell instrument in which the term *happiness* is found, or in the instrument as a whole, that indicated an intent that it should be given a broader connotation than its usual and ordinary meaning. It was found that the qualifying language—

> ". . . *provided that the trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties.*" (Emphasis supplied.)

indicated the contrary. The Washburn instrument specifically admonishes the trustee not to deplete the trust estate—

> "by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live."

From this it follows, that any reduction in corpus would have to be justified and in this respect it is important to note that the Grantor's wife (Mrs. Washburn) had nothing to say in regard to invasions for her benefit. The final portion of paragraph 5 of the Trust Agreement—

> "her enjoyment of the benefits *of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement.*" (Emphasis supplied.)

means nothing more than (1) the Grantor's wife (Mrs. Washburn) is entitled to the trust assets first, but *not* in excess of the standard of living requirement previously set forth and (2) the Trustee is protected from a re-

mainderman who might claim that the Trustee favored one beneficiary over another without sufficient authorization.

The *Powell* opinion set forth excellent reasoning that is most appropriate for the case at hand and had it been applied properly, Petitioners would not be here involved as Petitioners. In *Powell*, the Government contended that by using the word *happiness*, complete and unbridled authority was vested in the Grantor. This was rejected with the Court reasoning that Kansas law had to be considered:

> "[1] The trust instrument was executed and was to be carried out in the State of Kansas, for benefit of persons who were citizens and residents of that state. It was governed, therefore, by Kansas law.
>
> "[2] It is well settled, under the law of Kansas, that a court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion. The Supreme Court of Kansas so held in Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541, 543, with respect to a trust instrument which gave large discretionary powers to the trustee. It reiterated that doctrine in In re Porter's Estate, 164 Kan. 92, 187 P. 2d 520, 525, in which the court said:
>
> 'Notwithstanding the powers and discretion given to the trustee he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust.'
>
> "[3, 4] In our opinion, the instrument gave the trustees no such unbridled discretionary power or authority. It is well settled that where there are two or more beneficiaries of a trust, it is the duty of the trustee to administer the trust impartially, as

between the beneficiaries, and where a Trustee under a trust is directed to pay the income to a beneficiary during his life and on his death to pay the income from the trust or the corpus to another beneficiary, it is the duty of the trustee so to administer the trust as to preserve a fair balance between them."

The latter part of the above-quoted portion of the *Powell* opinion was taken from Scott on Trusts, 2nd Ed., Vol. II, at paragraph 183, perhaps the foremost trust authority in modern American Jurisprudence.

The *Powell* opinion also delves into the meaning of the word happiness as used in the governing instrument, pages 826 and 827 of the report:

"The usual and ordinary meaning of 'happiness' is a 'state of well-being characterized by relative permanence.' Webster's New International Dictionary, Second Ed., Unabridged, p. 1136. It is synonymous with 'comfort' or 'welfare.' Macmillan's Modern Dictionary, Rev. Ed. 1944; Webster's New International Dictionary, Second Ed., Unabridged, p. 2900. It is 'that more permanent enjoyment of life which attends on, and is almost identical with, welfare.' 39 C.J.S. Happiness, p. 773. Webster's New Collegiate Dictionary, 11th Ed., 1959, p. 375, defines 'happy' as 'enjoying well-being, peace, and comfort.'

"Webster's New International Dictionary, Second Ed., Unabridged, p. 2900, defines 'welfare' as 'state or condition in regard to well-being; esp, condition of health, happiness, prosperity, or the like.' In its ordinary sense 'happiness' has the characteristic of permanence or endurance, as distinguished from pleasure, which is transitory. Funk and Wagnall's Synonyms, Antonyms and Prepositions, Rev. Ed. 1947, delineates the objective qualities of 'happiness,' as contrasted with 'pleasure,' as follows:

> 'Happiness is * * * more serene and rational than pleasure; pleasure is of necessity transient; happiness is abiding; thus, we speak of pleasures, but the plural of happiness is scarcely used. Happiness, in the full sense, is mental or spiritual or both, and is viewed as resulting from some worthy gratification or satisfaction; we can speak of vicious pleasure or delight, but not of vicious happiness * * *.'
>
> There are many adjudicated cases holding that the terms 'happiness,' 'welfare,' and 'comfort' are synonymous."

The Tenth Circuit in *Powell* concluded that the word *happiness*, as it appeared in the applicable instrument, was synonymous with welfare and comfort and recognized the fact that the words *welfare* and *comfort* provide an ascertainable and judicially enforceable external standard. It was further stated:

> "We conclude that the provisions in the trust instrument giving the trustees power to use the corpus 'for the maintenance, welfare, comfort or happiness' of the beneficiaries and for the education of the daughters, the remaindermen, 'provided * * * the purpose for which the payments are to be made,' justifies the reduction in the corpus, established an ascertainable, external and judicially enforceable standard and that the trustees, in exercising such power, were limited by such standard and the supervision and control of the courts of Kansas in the exercise of their equity powers.'"

From this opinion, which clearly set the record straight with reference to the use of the word happiness in a Kansas instrument and as it applies to an ascertainable standard, it is most difficult to understand why such a radical turnabout can be pursued in the case at hand. It

is nothing more than verbal hairsplitting of the most offensive type. The Tenth Circuit has ignored its interpretation of the Kansas law as set out in *Powell* and has virtually based its decision on a use of the word *happiness* which is contrary to Kansas law.

Under the law of Kansas, it is not permissible to pick out some single words or phrases to determine intention but on the contrary the whole instrument in its entirety is to be considered. See *Williams* v. *McKinney*, 34 Kan. 514; *In re Estate of Buckner*, 186 Kan. 183; *In re Estate of Ellertson*, 157 Kan. 492; *Morse* v. *Henlon*, 97 Kan. 399; *Ernst* v. *Foster*, 58 Kan. 438; *Shanny* v. *Strong*, 160 Kan. 206; *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *In re Estate of Woods*, 181 Kan. 271; *United States* v. *Powell*, 307 F. 2d 821. The Kansas law is also clear on the point that it is not permissible to employ rules of construction where the intention is expressed clearly and unequivocally in the will. See *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *Morse* v. *Henlon*, 97 Kan. 399; and *In re Estate of Ellertson*, 157 Kan. 492.

The fundamental Kansas rule regarding the interpretation of testamentary instruments must be realized. This rule is that the intention of the testator is to be gathered from the will as a whole and that intention must prevail if it is consistent with the rules of law. As the Kansas Supreme Court stated in *Ellertson*:

> "The will is to be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the purposes of the testator as gathered from the entire will, and to effectuate rather than defeat the intention of the testator. Controlling significance is not to be given to one of the terms of devise or bequest and other terms ignored."

From this it is apparent that, if Mrs. Washburn had attempted to defeat the interests of the remaindermen by relying on the part—

> ". . . her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees . . ."

an insurmountable obstacle in the form of the Kansas Supreme Court decision *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d 359, would have presented itself.

In Woods, the decedent's will provided for trust income to his wife Frances for life then income to his daughter Catherine for life, remainder to charity. Paragraphs 5 (d) and 5 (e) of the will provided for invasion of corpus:

> "5 (d) Wherefore it is my will and desire that throughout their lives my wife (Frances) and daughter (Catherine) shall possess all the necessities and such luxuries as they have, generally speaking grown accustomed to during my life and if after my death the income from the trust estate shall fail to fully provide such necessities, comforts and luxuries, it is my will and desire that there shall be paid to my wife during her lifetime out of the funds of my estate and additional sums above the annual income, needed for her comforts, and even for any desired luxuries. And the same generous treatment is to be given my daughter, Catherine, after my wife's death, if there should be need, after considering her own separate resources and income a full report of which should be given at any time asked by my executor."

> "5 (a) To my executor and to his successors, if any, I make it plain that the essence of this testament is that the funds of my estate are to be used first to provide for the comfort and happiness of my wife,

Frances Woods, during her lifetime, and after my wife's death to provide for the comfort, and happiness of my daughter, Catherine Billings. That in case either shall become mentally or otherwise incapacitated, she shall be constantly provided with the utmost in care, comfort, and medical attention. And to effect these requirements I direct that the funds of the estate be applied without stint or quibble. This is my living responsibility and I direct that it be continued after my death to the last penny of my estate, if necessary to serve my wife, whose active intelligent and self sacrificing help in building that estate is hereby gratefully and lovingly acknowledged."

The Kansas Supreme Court held that the widow and daughter were to have all the necessities, comforts and luxuries as they had, generally speaking grown accustomed to during testator's life, saying at page 277 of the State Reports:

"As has often been said, the intentions of a testator must be determined from the whole Will—from the four corners of the instrument. Had the Will stopped with sub-paragraph (b) (relating to the income only) such a conclusion as that reached by the trial court may have been more tenable but the further provisions of sub-paragraph 5 (d) (quoted above) and the early part of 5 (e) (also quoted above) make it clear that Frances and Catherine were to possess all the necessities, comforts and such luxuries, as they had generally speaking grown accustomed to during testator's life." (Emphasis supplied.)

It was further pointed out by the Court that Catherine was entitled to the proceeds of the corpus from time to time to keep her in that position in life intended by the testator, which as quoted above was:

". . . to possess (that is enjoy) all the necessities, comforts and such luxuries as they had generally speaking *grown accustomed to during* his life." (Emphasis supplied.)

Of special import is the fact that the Kansas Court did not consider that the word happiness used in the will was of any particular significance. The decision was based upon the entire language as modified by the standard of living clause. This treatment is in accordance with the Federal decisions as summarized in *Berry v. Kuhl*, 174 F. 2d 565.

Inasmuch as the state court decision is controlling in the interpretation of a testamentary disposition, we are forced to conclude that *Woods* occupies the position of the ruling case in interpreting the Frank E. Washburn Trust Agreement, since both of the governing instruments substantially match each other in the critical parts. For example, the *Woods* language *comfort* and *happiness* is matched by the *Washburn* language *comfort, welfare, contentment* and *happiness; Woods* language *grown accustomed* is matched by the Washburn phrase *she has been accustomed; Woods* Trustees were instructed to invade corpus if need be for the wife and daughter to *possess all the necessities, comforts and such luxuries as they had generally speaking grown accustomed to while* the *Washburn* Trustee was instructed to invade corpus if need be for the wife to *continue to live in the manner in which she has been accustomed;* and finally, the Woods Trustees were instructed that *to effect these requirements they could invade corpus without stint or quibble—to the last penny* which provision is matched by the *Washburn* instruction to his Trustee—*her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the*

benefit of the distributees hereafter named in paragraph 9 of this Trust Agreement.

While the language of the Washburn Trust Agreement which states *that her enjoyment of the benefits of the Trust Estate are to be considered paramount to the conserving of assets for distributees* is probably more lawyerlike than the use of the words *without stint or quibble —to the last penny,* both provisions mean the same and perform the same function. Such a provision is to protect the Trustee from possible claim for surcharge, if and when the Trustee should find it necessary or advisable to use corpus for enabling the wife and daughter in Woods or Lucy Tullock Washburn in the case at hand, respectively:

> *to possess all the necessities and such luxuries as they have generally speaking grown accustomed to during my life*
>
> or
>
> *in order that she may continue to live in the manner in which she has been accustomed to live.*

A provision of this sort, expressed in some way or other is a legal requirement of a properly prepared testamentary instrument containing provisions for lifetime support and remainder over to charity or in any other case where there is a possibility that the Trustee may possibly have to choose whether to prefer the rights of one beneficiary over another and be subject to surcharge in the absence of such provisions.

In its opinion in the case at hand the Tenth Circuit in discussing *Woods* found—

> "Woods does offer some support for the proposition that under Kansas law the word *happiness* does not

broaden the standard-of-living-test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently *depleted* to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds, in excess of those necessary to maintain her standard of living. Only if it had, would the questions before us have been decided. In view of the almost unanimous holdings of the courts that *happiness* creates a broader, more subjective test than the standard-of-living clause we are unable to conclude from *Woods* that Kansas would limit invasion of corpus in the instant case to the standard-of-living criterion." (Emphasis supplied.)

Petitioners cannot accept such a finding in view of the *Woods* decision and especially the following part of the opinion—

> "We can see no other result to this phase of the lawsuit than that Catherine is entitled to the net proceeds of testator's estate and if the executor-trustee is of the opinion that such a share is too large, then it is his right to request, and her duty to furnish, a report so that it can be determined by the executor-trustee, and in turn by the court, to what sums she is entitled from time to time to keep her in that position in life intended by the testator."

This pronouncement by the Supreme Court of Kansas is conclusive to the effect that the provisions in the will established an ascertainable standard and the life beneficiaries were entitled to only that amount necessary to keep them in that position of life intended by the testator, i.e., the standard of living enjoyed at the time of testator's death. Also the Kansas Supreme Court acknowledged the well-

settled law of Kansas that a Court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion.

So from the *Woods* case, it must be concluded that the trustees, in the case at hand, would have invited surcharge and litigation had they indiscriminately administered the trust in favor of the life beneficiary to the detriment of the remaindermen, i.e., had they provided more than what was necessary to maintain that certain standard of living of the life beneficiary.

It has always been the rule and practice in the federal judicial system that when a question of state law is involved, the federal courts will generally defer to the decision of a jurist sitting in a court (state or federal) located in the state in question, especially where such jurist has a background of long years of practice as an attorney at the bar of the state in question. In the present case, District Judge Arthur Stanley, Jr., who rendered the decision in the trial court, eminently meets these qualifications, and ruled in this case that as a matter of Kansas state law, the instrument in question is to be interpreted as providing an ascertainable standard, and that the word "happiness" is governed and limited by the standard of living clause. Yet the Court of Appeals, speaking through a panel of judges none of whom has ever practiced in Kansas or sat as a judge in a Kansas state court or the United States District Court for Kansas, saw fit to reject and disregard Judge Stanley's decision on a question of Kansas state law.

We had thought that this Court had long since made clear its policy that federal courts should defer to jurists experienced in the law of the state in question in cases like this, but since the Court of Appeals has ignored this

policy, we submit that it is important for this Court to clarify, amplify and re-emphasize its policy in this area, which is one of general importance to the federal judicial system.

Where there is a standard of living clause in the governing instrument, or even where from the manifest but unexpressed intention of the testator a standard of living clause can be implied, the charitable deduction has been allowed even though the widow is expressly authorized to take what she wants. Thus in *Lucas* v. *Mercantile Trust Company*, 43 F. 2d 39, the will left remainder to charity and directed the Trustees to pay the widow all net income, or if need be such part of the corpus as may be necessary for the *comfort, maintenance* and *support of my wife:*

> *"a request in writing to my Trustee made by my wife stating that the sum requested by her is needed for her comfort, maintenance and support shall be authority in my Trustee to pay unto her any sum so requested."* (Emphasis supplied.)

The government contended that the widow was given the unlimited right to invade the corpus of the trust and absorb any part or all thereof for her comfort, support, and maintenance and therefore the value of the charitable bequests could not be ascertained, and hence could not be deducted from the gross estate for the purpose of computing the net estate subject to tax.

The Court announced two principles which are significant in considering the Frank E. Washburn Trust Agreement. The Court stated:

> *"Someone must determine what the term 'if need be' means, also what the phrase 'may be necessary' for the comfort, maintenance and support means and the one*

> *to determine that within reasonable bounds is the Trustee."* (Emphasis supplied.) (In the case at hand that is The Boatmen's National Bank of St. Louis.)

It was further held by the Court that under the will the widow could not cut off the charitable bequest at her *whim,* because if the sum requested was not found, in the good faith judgment of the trustee, to be needed to maintain the widow in a manner befitting her station in life, then no invasion could be made. The charitable deduction was allowed in full.

It is to be noted that in *Lucas,* the will itself did not limit the invasion *to the manner befitting her station,* i.e., *the manner in which she has been accustomed to live,* but the Court determined *that such was the intent of the testator.* The Court further stated that if the Trustee should pay to the widow any sum stated by her to be required for her living, without itself determining the need thereof, the Trustee would be in violation of its statutory duty and could be surcharged for the amount.

Again there is no other conclusion to be reached but that paragraph 5 of the trust agreement furnishes an ascertainable standard and accordingly the charitable deduction must be allowed. That portion of the *Lucas* opinion is most appropriate to us here:

> *". . . The entire will shows that the power of the widow is limited and restricted by the judgment of the trustee. The desire of the testator is apparent. His humane purposes after providing amply for his widow, to assist unfortunate and afflicted humanity should not be destroyed by a strained and almost ridiculous construction of the will."*

The purpose and intent of paragraph 5 of the Trust Agreement, and therefore its meaning, is to provide that Lucy Tullock Washburn is to have everything needed to

enable her to live in the manner in which she had been accustomed to live, but only, and not otherwise, if the Trustee should determine in good faith that her financial circumstances were such as to make it necessary or advisable to invade the corpus of the Trust Estate for such purpose. In making such determination of necessity or advisability the Trustee had to consider that Lucy Tullock Washburn owned outright, over 1/2 million dollars in assets invested in income producing property, that she would and did receive another $110,000.00 at the death of Frank E. Washburn; and that she would have in addition thereto the income for life from another quarter of a million dollars in assets from his Trust Estate.

The litigation history of the ascertainable standard relating to charitable remainders, as partially hereinbefore set out, can be summarized with the phrase *on whom does the risk fall* or *wherein lies the risk.* If the Government, by the terms of the instrument, is at the *mercy* or *whim* of a beneficiary who can lawfully divert the charitable interest then surely no deduction should be allowed. If, however, the instrument provides adequate safeguards in the form of a disinterested trustee who must perform within the limits prescribed by the applicable state law with respect to that portion designated for charity and no beneficiary is enabled to divert such portion for noncharitable purposes, then clearly the Government bears no risk other than the *general uncertainty that attends human affairs.* (*Ithaca*)

3. The Tenth Circuit Court of Appeals erred in dismissing Petitioner's Motion to Dismiss Appeal which Motion was filed on the grounds that the Notice of Appeal by the United States was not filed within sixty (60) days from the date of the judgment appealed from in the District Court.

Petitioners request this Court to declare the denial of Petitioner's Motion to Dismiss the appeal by the United States from the District Court to be error. Consideration of this point does not appear in the Tenth Circuit's decision. Grounds for said motion to dismiss are that the notice of appeal was not filed within sixty (60) days from the date of the judgment appealed from as required by Rule 73(a) of the Federal Rules of Civil Procedure.

The United States contends that since a monetary figure did not appear in the Memorandum of Decision handed down by the District Court on December 23, 1966, a judgment as contemplated for the purposes of appeal was not in existence at that time. It is the Government's contention that the critical point of time began on June 1, 1967, when an entry, showing the amount of money to be refunded was entered in conformity with the judgment rendered December 23, 1966. Consequently, the Notice of Appeal filed July 28, 1967, was timely in its view.

The District Court in its order for summary judgment, stated:

> *"There is no dispute among the parties as to the amount of the refund to which plaintiffs (petitioners herein) would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiff's motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered."* (Emphasis supplied.)

The June 1, 1967 entry did nothing more than to recite in dollars and cents the amount to be refunded which amount was known by all concerned and was not in dispute.

In *United States* v. *F. & M. Schafer Brewing Co.*, 78 S.Ct. 674, Mr. Justice Whittaker stated that a judgment for money is final for the purposes of Rule 73 (a) if the amount is either shown in dollars and cents or the means for determining the amount is stated.

The Memorandum of Decision by the District Court states:

> "There is no dispute among the parties as to the amount of the refund. . ."

Certainly this tells us that the amount was known by both parties and was a fixed figure to be obtained by strictly mechanical means. This figure (the refund) simply depends upon the allowance of the charitable deduction claimed. In granting the Summary Judgment to the plaintiffs, the charitable deduction claimed on the estate tax return was given judicial sanction thus paving the way or *affording the means* for determining the amount. Accordingly, the time to appeal under Rule 73 (a) began to run from the date of docket entry by the Clerk of the Court:

> "There was entered on the docket December 23, 1966, a MEMORANDUM OF DECISION—granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment—a copy of which is enclosed."

This is another area of general importance to the federal judicial system. Litigants should be entitled to know when a case is at rest. The action of the Court of Appeals in accepting this long-delayed appeal, if left undisturbed, will continue in federal judicial procedure the existing uncertainty of the date on which a case has been finally decided.

CONCLUSION

Wherefore your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reversed.

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CERTIFICATE OF COUNSEL

The undersigned, Robert B. Langworthy, counsel of record for petitioners, hereby certifies that the above and foregoing petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and believed to be meritorious.

ROBERT B. LANGWORTHY

APPENDIX A-1

Opinion

United States Court of Appeals

TENTH CIRCUIT
May Term, 1968

UNITED STATES OF AMERICA,
Appellant,

vs.

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Appellees.

No. 9741

Appeal from the United States District Court
for the District of Kansas

Bennet N. Hollander (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Melva M. Graney, Louis M. Kauder, Attorneys, Department of Justice, and Newell A. George, United States Attorney, with him on the brief) for Appellant.

James J. Melching for Appellees.

Before MURRAH, Chief Judge, MARVIN JONES,* Senior Judge, United States Court of Claims, and BREITENSTEIN, Circuit Judge.

JONES, Senior Judge:

On June 19, 1954, decedent Frank E. Washburn had executed a revocable trust under which the income was to be paid to himself during his lifetime, thereafter to his wife

*Sitting by designation of the Chief Justice.

Lucy Tullock Washburn if she survived him, or to his sister if she survived him and his wife. Upon the death of the last income beneficiary, the trust estate was to be terminated and the principal distributed evenly among two charitable organizations and four of decedent's nephews.

Paragraph 5 of the trust empowered the trustee to invade the principal for the benefit of decedent's wife. Because the meaning of this paragraph is crucial to the decision of this case, we quote it in full:

> 5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be

depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement.

A federal estate tax return was filed on behalf of decedent's estate on June 25, 1958, in which taxpayer[1] attempted to deduct from the gross estate the value of the charitable remainders under Int. Rev. Code of 1954, § 2055 (a)(2). Upon an audit of this return, the charitable deductions were disallowed on the ground that Paragraph 5 of the trust does not provide an ascertainable standard for the invasion of the trust principal. Taxpayer paid the deficiency[2] and filed a claim for refund, which was denied. Taxpayer then brought this suit for refund under Int. Rev. Code of 1954, § 1346(a)(1) in the United States District Court for the District of Kansas. The district court granted taxpayer's motion for summary judgment, *Commercial National Bank* v. *United States*, 265 F. Supp. 806 (D. Kan. 1966), and the government has appealed.

Int. Rev. Code of 1954, § 2055(a)(2) allows a deduction from a decedent's gross estate in the amount of transfers to charitable organizations. Treas. Reg. § 20.2055-2(a) covers situations where the charitable transfer consists of a remainder interest with the intervening life estate belonging to a noncharitable beneficiary. This regulation states that a "deduction may be taken of the value of the

1. The Boatmen's National Bank of St. Louis, trustee, and the Commercial National Bank of Kansas City, administrator of decedent's will, are herein referred to collectively as "taxpayer."

2. The deficiency was based on several other issues in addition to the disallowance of the charitable deductions, but only the latter issue is before us.

charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life * * * and then to pay the principal to a charitable organization, the present value of the remainder is deductible." Where a trustee has a power to divert the principal to a noncharitable use, "the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power." Treas. Reg. § 20.2055-2(b).

Two Supreme Court cases have established what have become the traditional rules of thumb in applying Section 2055 and its regulations to specific instruments. In *Ithaca Trust Company* v. *United States*, 279 U. S. 151 (1929), the trust allowed the life beneficiary to withdraw from the principal any amount "that may be necessary to suitably maintain her in as much comfort as she now enjoys." Justice Holmes, in allowing a charitable deduction, remarked that "the standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator * * * was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs." 279 U. S. at 154.

The second Supreme Court case, *Merchants National Bank* v. *Commissioner*, 320 U. S. 256 (1943), involved a trust in which the grantor authorized the trustee to invade corpus "for the comfort, support, maintenance, and/or happiness" of his wife. The grantor stated further that "it is my wish * * * that * * * my said Trustee shall exercise its discretion with liberality to my said wife, and

consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." The Court denied the charitable deduction, stating that "the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. Here, for example, her 'happiness' was among the factors to be considered by the trustee." 320 U. S. at 261. The Court was willing to assume the unlikelihood of invasion. Nevertheless,

> * * * Congress has required a more reliable measure of possible expenditures and present value than is now available for computing what the charity will receive. The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction. This is not a "standard fixed in fact and capable of being stated in definite terms of money." *Cf. Ithaca Trust Co.* v. *United States, supra.* Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. [320 U. S. at 262-63.]

From these Supreme Court pronouncements there have been distilled generally accepted principles. For a charitable remainder subject to invasion to be deductible, it must first be established that the instrument contains an ascertainable standard of invasion, *i. e.*, one which is capable of being stated in definite terms of money. In all cases allowing the deduction, this ascertainable standard has been the standard-of-living criterion, either expressly stated or implied from the language of the instrument. If no such standard exists, the charitable deduction is denied,

no matter how remote the possibility of invasion might be. If the instrument contains such a standard, then the court will determine the likelihood of invasion. *See e. g., Salisbury* v. *United States*, 377 F. 2d 700, 703 (2d Cir. 1967); Rev. Rul. 54-285, 1954-2 Cum. Bull. 302; Taggart, *Charitable Deductions for Transfers of Remainder Interests Subject to Invasion*, 21 Tax L. Rev. 535, 562 (1966); Albert, *Merchants National Bank* v. *Commissioner and its Uncharitable Aftermath*, 67 Dick. L. Rev. 145, 148 (1963):

In determining whether an ascertainable standard exists, we must interpret the instrument's language in conformity with state law. See *Blodget* v. *Delaney*, 201 F. 2d 589 (1st Cir. 1953). Thus our problem may be stated as whether, under the law of Kansas, Paragraph 5 of the trust limits the invasion of principal to the standard-of-living criterion.

Similar problems under section 2055 and its predecessor have often been resolved by deciding whether the language of the instrument in question more nearly resembled that in *Ithaca* or *Merchants Bank*. Paragraph 5 of the trust before us contains language similar to the invasion-of-principal clauses in both *Ithaca* and *Merchants Bank*. It resembles *Merchants Bank* in two respects. First, principal may be invaded for the "comfort, welfare, contentment and happiness" of grantor's wife. The phrase in *Merchants Bank* was "comfort, support, maintenance, and/or happiness." Secondly, the trustee in the case before us is admonished tha

> while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees * *

In *Merchants Bank* the admonitory clause stated that the trustee should "exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

The following language of Paragraph 5 resembles the trust in *Ithaca*:

> In determining the necessity or advisability of making such payments or distributions out of principal * * * the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *.

The trust in *Ithaca* allowed withdrawal of such sums as "may be necessary to suitably maintain her in as much comfort as she now enjoys."

The government argues that because principal may be invaded for the "happiness" of the life beneficiary and because the trustee is admonished that the life beneficiary's "enjoyment of the benefits of the said trust estate shall be considered as paramount to the conserving of assets * * * for the benefit of the distributees," the standard of invasion falls within the rule of *Merchants Bank* as being too indefinite. The government recognizes that the standard-of-living clause meets the requirement for definiteness, but argues that where an instrument contains both a broad and a narrow standard of invasion, the instrument must be treated as permitting invasion to the extent of the broader standard. In other words, the broad or indefinite standard establishes the outermost limit of invasion, not the narrow or definite one. See *Union Trust Company* v. *Tomlinson*, 355 F. 2d 40 (5th Cir. 1966).

Taxpayer contends that *Merchants Bank* and all the other decisions denying a charitable deduction have involved instruments which contained no standard-of-living clause, and that where such a clause is present, words such as "happiness" are of no importance since they must be interpreted to mean the same thing as the standard-of-living clause.

We do not agree with this argument. It is not true, as taxpayer asserts, that "all of the decisions denying charitable deductions in computing estate tax are those having no standard-of-living clause." Several cases denying the deduction have involved instruments with either an express standard-of-living clause or language which is commonly construed as establishing a standard-of-living criterion. The fatal defect of those instruments was that they contained, in addition to the definite standard, language which went beyond the permissible limits established by *Ithaca* and *Merchants Bank*.

In *Union Trust Company* v. *Tomlinson*, 355 F. 2d 40 (5th Cir. 1966), the trust expressly established a standard-of-living test for invasion of principal. The trust went on to say, however, that the trustee should "give sympathetic consideration to any requests that my wife may make from time to time," and the trustee was authorized "to be generous in the exercise of this discretion even though there may be considerable depletion of the Trust Estate." It was held that the latter language made the standard of invasion too indefinite to permit the deduction.

Likewise, in *State Street Bank & Trust Company* v. *United States*, 313 F. 2d 29 (1st Cir. 1963), the will allowed invasion of principal for the benefit of the widow as the trustees "in their uncontrolled discretion may deem necessary or advisable for her comfortable support and maintenance and for any other reasonable re-

quirement * * *." The court held that "comfortable support and maintenance" established the standard-of-living test, but that "any other reasonable requirement" authorized a higher and immeasurable standard. See also *Gammons* v. *Hassett*, 121 F. 2d 229 (1st Cir.), *cert. denied*, 314 U. S. 673 (1941); *Marine Trust Company* v. *United States*, 247 F. Supp. 278 (W.D. N.Y. 1965); *Vaccaro* v. *United States*, 224 F. Supp. 307 (D. Mass. 1963).

These authorities support the government's contention that where an instrument contains both a broad and a narrow standard of invasion, the broad standard should be given effect. It seems that to do otherwise would require the court to ignore the broader language.

Taxpayer argues, however, that under Kansas law the word "happiness" does not enlarge the standard-of-living test. Taxpayer relies on one Kansas case to support this proposition, *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d 359 (1957). Paragraph b of the instrument in *Woods* gave the income to testator's wife for life, then stated that

> Upon the death of my wife, if my daughter Catherine has survived her, it is my will * * * that if and when my said daughter's personal funds become depleted, from that time on the entire net income from said trust estate be paid to my said daughter * * *. [311 P. 2d at 364.]

Paragraph d allowed invasion of corpus for the benefit of testator's wife and daughter according to the standard-of-living criterion. In Paragraph e, testator stated that the "essence" of his testament was first to provide for the "comfort and happiness" of his wife and daughter and directed that the funds be applied to that purpose "without stint or quibble."

Testator's daughter, a cotrustee, sought to establish her right to receive the income from the trust after the death

of her mother, alleging that her personal funds had become "depleted" within the meaning of Paragraph b. The trial court denied the daughter's claim on the ground that her funds were not sufficiently depleted. The Supreme Court of Kansas reversed on this point. The supreme court stated that in Kansas "the intention of a testator must be determined from the whole will—from the four corners of the instrument." 311 P. 2d at 365. From Paragraphs b, d, and e, the court determined that testator intended for the daughter to receive income when her funds were so depleted as to prevent her from maintaining the standard of living she had grown accustomed to in testator's lifetime. The daughter's funds were sufficiently depleted to allow her to share in the income. 311 P. 2d at 366-67.

Woods does offer some support for the proposition that under Kansas law the word "happiness" does not broaden the standard-of-living test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently "depleted" to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds in excess of those necessary to maintain her standard of living. Only if it had, would the question before us have been decided. In view of the almost unanimous holdings of other courts that "happiness" creates a broader, more subjective test than the standard-of-living clause, we are unable to conclude from *Woods* that Kansas would limit invasion of corpus in the instant case to the standard-of-living criterion.

Taxpayer also relies on *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962). The trustee in *Powell* was authorized to invade principal "for the maintenance, welfare, comfort or happiness" of the beneficiaries and was

admonished that, before principal was invaded, he should "deem that the purpose for which the payments are to be made, justifies the reduction in the principal * * *."

The court found "happiness" to have the same meaning as "welfare" and "comfort," which are commonly construed to impose the standard-of-living test. *Merchants Bank* was distinguished on the ground that there the trustee had been given a broader power of invasion:

> It is clear, we think, that the court accorded such broader connotation to the word "happiness," because of the context in which it was found and, particularly, the instructions to the trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries. [307 F. 2d at 827.]

The instrument in *Powell*, on the contrary, "indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828.

We believe that *Powell* is distinguishable from the instant case for the same reason it was distinguished from *Merchants Bank*. The trustee in the instant case was told in the second sentence of Paragraph 5 that the life beneficiary's "enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets * * * for the benefit of the distributees * * *." This language is comparable to the admonitory clause in *Merchants Bank* which was used by the *Powell* court to explain the broad interpretation of "happiness" in *Merchants Bank*.

The phrase "said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will

be endangered so long as the Grantor's said wife shall live" does not so restrict the power of invasion as to bring the trust in this case within the scope of *Powell*. The "purposes and intentions" referred to are: "providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *." Thus the aforementioned phrase means only that the principal is not to be depleted so rapidly as to exhaust it before the life beneficiary's death, and is not inconsistent with an interpretation of "happiness" in accord with *Merchants Bank* and the vast majority of subsequent cases.

The question we must decide is whether a Kansas court would allow invasion of the trust principal under Paragraph 5 beyond the standard-of-living criterion. Although *Woods* and *Powell* indicate that in Kansas "happiness" is not a magic word compelling the automatic consequence of indefinitely broad powers of invasion, we do not construe Paragraph 5 as limiting the trustee to the standard-of-living criterion.

Powell establishes that we are to gather the intent of the testator from the instrument as a whole. It is clear that the whole of Paragraph 5, save for the phrase "and in order that she may continue to live in the manner in which she has been accustomed to live," indicates the intent to allow invasion of principal beyond the standard-of-living test. In 1954 when this trust was drafted, *Merchants Bank* had for 11 years been a landmark decision in this area of the law. To all lawyers practicing in the estate tax field, the Supreme Court's interpretation of "happiness" must have been abundantly clear. The consequences of an admonitory clause stating that the life beneficiary's enjoyment was to be "paramount" to the conserv-

ing of assets for the remainderman must also have been apparent. *Powell* and *Woods*, the two cases relied upon by taxpayer to show that Kansas would interpret Paragraph 5 was establishing a standard-of-living test, were not decided until after this trust was drafted. The inclusion of the standard-of-living test does not nullify the purport of the entire remainder of Paragraph 5. Its effect is to create a definite, minimum standard of invasion in addition to the indefinite standard established by the rest of the paragraph. Under the reasoning of *Union Trust* and *State Street*, the scope of invasion cannot be limited to the standard-of-living clause. Since the standard of invasion is fatally indefinite, it is unnecessary to inquire into the probability of invasion.

REVERSED AND REMANDED.

APPENDIX A-2

Opinion

Woods does offer some support for the proposition that under Kansas law the word "happiness" does not broaden the standard-of-living test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently "depleted" to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds in excess of those necessary to maintain her standard of living. Only if it had, would the question before us have been decided. In view of the almost unanimous holdings of other courts that "happiness" creates a broader, more subjective test than the standard-of-living clause, we are unable to conclude from *Woods* that Kansas would

limit invasion of corpus in the instant case to the standard-of-living criterion.

Taxpayer also relies on *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962). The trustee in *Powell* was authorized to invade principal "for the maintenance, welfare, comfort or happiness" of the beneficiaries and was admonished that, before principal was invaded, he should "deem that the purpose for which the payments are to be made, justifies the reduction in the principal * * *."

The court held the charitable remainder deductible. "Happiness" was found to have the same meaning as "welfare" and "comfort," which are commonly interpreted to impose the standard-of-living test. *Merchants Bank* was distinguished on the ground that there the trustee had been given a broader power of invasion:

> It is clear, we think, that the court accorded such broader connotation to the word "happiness," because of the context in which it was found and, particularly, the instructions to the trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries. [307 F. 2d at 827.]

The instrument in *Powell*, on the contrary, "indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828.

We believe that *Powell* is distinguishable from the instant case for the same reason it was distinguished from *Merchants Bank*. The trustee in the instant case was told in the second sentence of Paragraph 5 that the life beneficiary's "enjoyment of the benefits of said Trust Estate should be considered as paramount to the con-

serving of assets * * * for the benefit of the distributees * * *." This language is comparable to the admonitory clause in *Merchants Bank* which was used by the *Powell* court to explain the broad interpretation of "happiness" in *Merchants Bank*.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9741

UNITED STATES OF AMERICA,
Appellant,

vs

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Appellees.

PETITION FOR REHEARING

Introductory Statement

Appellees, The Commercial National Bank of Kansas City and The Boatmen's National Bank of St. Louis, respectfully petition this Honorable Court for rehearing of the decision and opinion in Case No. 9741 filed May 29, 1968, whereby the Court reversed the decision of the Trial Court which granted summary judgment in favor of said appellees. In support of its position, appellees state that the opinion erred in construing the law of Kansas respecting property rights arising out of testamentary instruments and apparently gave no consideration to sworn statements made by competent parties in connection with the intent and meaning of the provisions contained in the governing instrument which gave rise to this litigation

Appellees' Basis for Urging Rehearing and Reconsideration

In the first full paragraph on page seven (7), the opinion states that the problem is whether, under the law of Kansas, paragraph five (5) of the trust limits the invasion of principal to the standard-of-living criterion. The decision, however, appears to be based on Court decisions other than those involving Kansas law.

The District Court's decision was made by a Kansas jurist well-versed in Kansas law. There, the Court gave consideration to sworn testimony of Robert B. Langworthy (R. 54-66), Lucy Tullock Washburn (R. 38-42) and C. D. Cowdery (R. 43-45). These affiants testified factually as to the *intention* of the parties regarding the meaning of the Trust Agreement. It should be noted that the testimony submitted by these parties is competent proof. The testimony is not spurious in its origin but comes from responsible citizens making up the backbone of this country. The testimony is proof that it was the intention of the parties that the surviving spouse would be entitled to distributions from corpus *only* in order to live in the manner in which she had been accustomed to live. This testimony contained in the respective affidavits should not be disregarded as self-serving. Sworn testimony cannot be discarded merely because it supports that for which the witness contends. See *National Labor Relations Board* v. *Walton*, 286 F. 2d 26. The testimony in the form of affidavits is competent and admissible in proof of the facts therein stated, to include the testimony as to the law of Kansas. See *Mappes* v. *United States*, 318 F. 2d 508 (Court of Appeals, Tenth Circuit).

It is to be noted that the appellant did not introduce evidence or testimony that rebutted or neutralized that advanced by appellees in the District Court. Since the af-

fidavits made up the only testimony, were not contradicted or disputed and were offered in proof of the intent of the parties concerned, it follows that the Court should give them due consideration in its decision respecting its interpretation of the governing instrument. In essence there exists uncontroverted proof of the intention contained in the governing instrument, i. e., the surviving spouse would be entitled to only that required to maintain the standard of living to which she was accustomed at the time of her husband's death, but the very opposite determination has been made by the Court.

A. The power to invade corpus

(1) Appellees in their brief have cited the Kansas Supreme Court decision *In re Estate of Woods,* 181 Kan. 271, in support of their contention that only an ascertainable standard existed in the governing instrument and the trustees were powerless to invade corpus for the benefit of the life tenant (surviving spouse) except to maintain her in the manner to which she had grown accustomed to live at the time of death of the Settlor. The Court reiterates the Kansas law on page 279 where it states:

> "We can see no other result to this phase of the lawsuit than that Catherine is entitled to the net proceeds of testator's estate and if the executor-trustee is of the opinion that such a share is too large, then it is his right to request, and her duty to furnish, a report so that it can be determined by the executor-trustee, and in turn by the court, to what sums she is entitled from time to time to keep her in that position in life intended by the testator."

In so stating the Kansas Supreme Court acknowledged the well settled law of Kansas that a Court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion.

There seems to be no other logical conclusion in view of the testimony and the provisions of the instrument itself, but that the trustees would have invited surcharge and litigation had they indiscriminately administered the trust in favor of the life beneficiary to the detriment of the remaindermen, i. e., had they provided more than what was necessary to maintain the certain standard of living of the life beneficiary.

(2) The opinion of the Court of Appeals places enormous weight on the use of the word *happiness* in the governing instrument, thus concluding that an ascertainable standard as required by law does not exist.

Under the law of Kansas, it is not permissible to pick out some single words or phrases to determine intention but on the contrary the whole instrument in its entirety is to be considered. See *Williams* v. *McKinney*, 34 Kan. 514; *In re Estate of Buckner*, 186 Kan. 183; *In re Estate of Ellertson*, 157 Kan. 492; *Morse* v. *Henlon*, 97 Kan. 399; *Ernst* v. *Foster*, 58 Kan. 438; *Shanny* v. *Strong*, 160 Kan. 206; *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *In re Estate of Woods*, 181 Kan. 271; *United States* v. *Powell*, 307 F. 2d 821. The Kansas law is also clear on the point that it is not permissible to employ rules of construction where the intention is expressed clearly and unequivocally in the will. See *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *Morse* v. *Henlon*, 97 Kan. 399; and *In re Estate of Ellertson*, 157 Kan. 492.

It is strongly urged that the fundamental Kansas rule regarding the interpretation of testamentary instruments be applied herein, which rule is that the intention of the testator is to be gathered from the will as a whole and that intention must prevail if it is consistent with the rules of law. As the Kansas Supreme Court stated in *Ellertson*:

"The will is to be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the purposes of the testator as gathered from the entire will, and to effectuate rather than defeat the intention of the testator. Controlling significance is not to be given to one of the terms of devise or bequest and other terms ignored."

B. The opinion erroneously interprets U. S. v. Powell, 307 F. 2d 821.

Appellees wish to bring to the Court's attention that an erroneous conclusion is contained in its opinion. On page 12 of the opinion, after stating the essential elements of *Powell*, the following sentence appears:

"The Court held the charitable remainder deductible." Of course *Powell* does not involve a charitable remainder question but instead concerns itself with the question of a Power of Appointment as contemplated under Section 811 of the 1939 Code, now Section 2041 of the 1954 Code. It was the Government's contention that a trust created by the decedent (Mr. Powell) some 22 years before his death was includible in his gross estate. In creating the trust, Mr. Powell named himself as a joint trustee with certain powers that gave rise to the contention that for virtually all intents and purposes the retention of said powers made him (Mr. Powell) the equitable owner of the trust assets at his death and they were thus includible in his estate for estate tax purposes.

This Court in *Powell*, in its discussion of *the power to invade corpus*, determined that there was nothing in the context of the *Powell* instrument in which the term *"happiness"* is found, or in the instrument as a whole, that indicated an intent that it should be given a broader connotation than its usual and ordinary meaning. In fact this Court found that the qualifying language—

> *". . . provided that the trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties."*

indicated the contrary. The *Washburn* instrument specifically admonishes the trustee not to deplete the trust estate *"by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live. . ."* From this it follows that any reduction in corpus would have to be justified and in this respect it is important to note that the Grantor's wife had nothing to say in regard to reductions for her benefit.

The final portion of paragraph 5 of the Trust Agreement—

> *". . . her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Agreement."*

means nothing more than (1) the Grantor's wife is entitled to the trust assets first, but *not* in excess of the standard of living requirement previously set forth and (2) the Trustee is protected from a remainderman who might claim that the Trustee favored one beneficiary over another, without sufficient authorization.

C. Motion to dismiss.

Appellees request the Court to consider their timely filed motion to dismiss the appellant's appeal. Consideration of this point does not appear in the Court's decision of May 29, 1968. Grounds for said motion to dismiss are that the notice of appeal was not filed within sixty (60) days from the date of the judgment appealed from as required by Rule 73 (a), Federal Rules of Civil Procedure.

Appellants contend that since a monetary figure did not appear in the Memorandum of Decision handed down by the District Court on December 23, 1966, a judgment as contemplated for the purposes of appeal was not in existence at that time. It is their contention that the critical point of time began on June 1, 1967, when an entry showing the amount of money to be refunded was entered in conformity with the judgment rendered December 23, 1966. Consequently, the Notice of Appeal filed July 28, 1967, was timely in its views.

The District Court in its order for summary judgment stated:

> "There is no dispute among the parties as to the amount of the refund to which plaintiffs (*appellees herein*) would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiffs' motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered."

The June 1, 1967, entry did nothing more than to recite in dollars and cents the amount to be refunded which amount was known by all concerned and was not in *dispute.*

In *United States* v. *F. & M. Schaefer Brewing Co.*, 78 S. Ct. 674, Mr. Justice Whittaker stated that a judgment for money is final for the purposes of Rule 73 (a) if the amount is either shown in dollars and cents or "the means for determining the amount" is stated. The Memorandum of Decision by the District Court states:

> "There is no dispute among the parties as to the amount of the refund. . ."

Certainly this tells us that the amount was known by both parties and was a fixed figure to be obtained by strictly mechanical means. This figure simply depends upon the al-

lowance of the charitable deduction claimed. In granting the Summary Judgment to the plaintiffs, the charitable deduction claimed on the estate tax return was given judicial sanction thus paving the way or affording "the means for determining the amount." Accordingly, the time to appeal under Rule 73(a) began to run from the date of docket entry by the Clerk of the Court:

> "There was entered on the docket December 23, 1966, a MEMORANDUM OF DECISION—granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment—a copy of which is enclosed." (R. 166)

Conclusion

1. Appellees respectfully submit that the vital and controlling factors of this dispute are the Kansas decisions which have time after time reiterated the principles that—

> (a). The whole purpose of construing a Will or other instrument affecting property rights is to discover the real intention of the testator or grantor,
>
> (b) in order to determine that intention it is not permissible to pick out some single words or phrases but on the contrary the whole instrument in its entirety is to be considered, and
>
> (c) there is no occasion for employing any rules of construction where the intention is expressed clearly and unequivocally in the Will.

2. The Court is urged to consider the sworn testimony of competent witnesses which testimony was considered by the District Court and was not contradicted nor disputed by appellants. Through this testimony, it is again evident that the grantor's intent was to permit invasion of corpus *only* to the extent necessary for the life beneficiary to continue to live in the manner in which she had been accustomed to live.

3. The instrument at hand, with respect to the possibility of invasion of corpus, provides an adequate safeguard in the form of a disinterested trustee. This trustee must exercise its sole discretion in conformity with applicable law and is required to perform according to trustee standards. The trustee is not at the mercy or whim of a beneficiary who can lawfully divert the charitable interest. There is no risk falling on the Government other than *the general uncertainty that attends human affairs, Ithaca Trust Co.*

4. In filing its Notice of Appeal, it appears that appellants were more than five months late as contemplated by Rule 73(a), Federal Rules of Civil Procedure.

5. Appellees are under the impression that the United States Courts of Appeals normally defer on questions of state law to the considered opinion of a United States District Judge sitting in such state and who has had long experience as a jurist and attorney in that state, particularly where none of the Court of Appeals Judges deciding the case had practiced in or been permanently assigned as a trial judge in such state. Such a procedure appears to have been followed in *United States* v. *Powell*, 307 F. 2d 821, particularly on page 823 of the opinion where the findings of the District Court are discussed. For this reason Appellees had assumed that the interpretation of this Kansas instrument by the Kansas District Court would be accepted by the members of the Tenth Circuit Court of Appeals. The instrument at hand was interpreted by Judge Stanley, a jurist with long experience in Kansas law. However, appellees are willing to seek an independent interpretation in the Kansas State Courts if this Court will stay the present proceedings until such an interpretation can be obtained.

Accordingly, in view of the foregoing, appellees respectfully request the Court to grant this Petition for Rehearing

for the purpose of reconsidering and re-evaluating its decision.

Respectfully submitted,

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Certificate of Counsel

I, ROBERT B. LANGWORTHY, counsel for appellees in the above entitled cause, do certify that after careful examination of the opinion of this Court, I verily believe that the facts stated above and the items quoted in the above and foregoing Petition for Rehearing have been overlooked by the Court and that these facts are material; and I also verily believe that the Court has overlooked and failed to apply the decisions and law set out in said Petition which are controlling and which require a different judgment from that rendered; I do further certify that this Petition for Rehearing is filed in good faith and not for the purpose of delay.

Dated this 14th day of June, 1968.

ROBERT B. LANGWORTHY
One of the Attorneys for Appellees

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OFFICE OF THE CLERK
Denver, Colorado 80202
July 5, 1968

No. 9741, U. S. A. vs. The Commercial National Bank of Kansas City, et al.

Mr. Bennet N. Hollander
Mr. Mitchell Rogovin, Assistant Attorney General
Department of Justice
Washington, D. C.

Gentlemen:

Enclosed is a revised copy of the opinion in the above captioned case. Please note the changes on pages 12 and 13.

An order has been entered today denying the petition for rehearing.

Yours very truly,

William L. Whittaker
Clerk

WLW:rhj

CC: Mr. Newell A. George, U. S. Attorney, Box 1537, Topeka, Ka.

Mr. James J. Melching, Third Floor Union National Bank, Kansas City, Missouri 64106

Mr. Homer Davis, 402 Shawnee Street, Leavenworth, Kansas

Messrs. Lewis, Richer, Tucker, Allen & Chubb, 1555 Railway Exchange, 611 Olive Street, St. Louis, Missouri 63101

P. S. In answer to your letter of July 2, 1968, the petition for rehearing was filed on June 17, 1968

MAY TERM, WEDNESDAY, MAY 29th, 1968.
Before Honorable Alfred P. Murrah, Chief Judge, Honorable Marvin Jones, Judge, United States Court of Claims, and Honorable Jean S. Breitenstein, Circuit Judge.

United States of America,
Appellant,

9741 vs.

The Commercial National Bank of Kansas City, a National Banking Association; The Commercial National Bank of Kansas City, a National Banking Association in its capacity as Administrator with Will Annexed of the Estate of Frank E. Washburn late of Leavenworth County, Kansas, Deceased;, The Commercial National Bank of Kansas City, a National Banking Association in its capacity as Executor of the Estate of Lucy Tullock Washburn, late of Leavenworth County, Kansas, Deceased; The Boatmen's National Bank of St. Louis, a National Banking Association; The Boatmen's National Bank of St. Louis, a National Banking Association in its capacity as Trustee of an express trust; and The Boatmen's National Bank of St. Louis, a National Banking Association in its capacity as a party with whom a contract has been made for the benefit of another,
Appellees.

Appeal from the United States District Court for the District of Kansas.

(Filed July 18, 1968. Charles W. Cahill, Clerk.
By Betty L. Ross, Deputy.)

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion of the court.

A true copy
Teste
/s/ William L. Whittaker
William L. Whittaker
Clerk, U.S. Court of Appeals, Tenth Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	No. KC-2259

(Filed December 23, 1966. Charles W. Cahill, Clerk.
By /s/ Mary Jean Wiggans, Deputy.)

Memorandum of Decision

This action to recover a refund from the defendant of certain federal estate taxes is brought by the plaintiffs under the provisions of 26 U.S.C.A. § 2055(a)(2). The facts re-

quired to accomplish a complete determination of the issues presented by this controversy are not in dispute, and the case is now before this court upon motion by both plaintiffs and by defendant for summary judgment. This suit being one against the United States for the recovery of an internal revenue tax alleged to have been erroneously and illegally collected, this court has jurisdiction. 28 U.S.C.A. § 1346(a)(1).

The undisputed facts so far as pertinent to the issues now before the court are as follows: By inter vivos trust agreement executed June 19, 1954, Frank E. Washburn placed in trust the major portion of his estate. That agreement provided that he, the settlor, should receive the income therefrom until his death; thereafter the income to go to his wife, should she survive him, for her natural life, and at her death the principal to be distributed as follows: two-thirds to four nephews of the settlor, and the remaining one-third to be divided equally between two corporations. These latter two beneficiaries are of the kind referred to by the provisions of 26 U.S.C.A. § 2055(a)(2). After the death of the settlor, and in assessing the federal estate taxes due from his estate, the defendant disallowed a claim by the plaintiffs for a deduction from the gross value of the estate the aforementioned one-third of the principal of the trust to be distributed to "charitable" or "educational" corporations. The appropriate administrative procedures having been followed with respect to the disallowance of this claim, the plaintiffs filed this suit for refund in the amount of $19,614.05 with interest.

There is no question that, where a trust is created providing for the distribution of all or a part of the principal to a charitable corporation at the termination of the trust, the amount of such transfer may be deducted from the value of the gross estate for estate tax purposes under

§ 2055(a)(2). The controversy here arises out of a provision in the trust agreement permitting invasion of the principal by the trustee for the benefit of the surviving spouse of the settlor. This provision is set out in full:

> "5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be

considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in * * * this Trust Agreement."

The inclusion of this provision in the trust agreement caused the defendant to disallow plaintiffs' claim for a deduction of the transfer of one-third of the principal of the trust to certain charitable corporations. The question presented, then, is whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal of the trustee for the benefit of the life beneficiary.

As has already been noted, the provisions of 26 U.S.C.A. § 2055(a)(2) would permit the deduction sought by plaintiffs absent the provision permitting invasion of the corpus by the trustee. However, where such a provision is incorporated in the trust agreement, the Internal Revenue Regulations (§ 20.2055-2) provide as follows:

"(a) *Remainders and similar interests.* If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. * * *

"(b) *Transfers subject to a condition or a power.* * * * If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the

> occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power. * * *."

In determining the manner in which § 2055 and the Internal Revenue Regulations pertinent thereto are to be applied to charitable transfers such as that presented by the facts in this case, the Supreme Court has held that:

> "For a deduction under § 303(a)(3) [now § 2205(a)(2)] to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. [citing] Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable." *Merchants Bank v. Commissioner*, 320 U.S. 256, 261 (1943).

What is required, therefore, in order that a charitable bequest subject to a condition be deductible is, first, an ascertainable standard whereby the value of the charitable bequest may be determined as of the date of the settlor's death, and second, a sufficient showing by the party asserting the claim for deduction that the chance of the charitable bequest being rendered ineffective is "highly improbable."

Regs. § 20.2055-2(b). That these two requirements must be satisfied is implicit in the cases. *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187 (1955); *Merchants Bank* v. *Commissioner, supra; United States* v. *Provident Trust Co.*, 291 U.S. 272 (1934); *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). If either is not fulfilled by the instrument here in question, and the surrounding circumstances, the deduction cannot be allowed.

There is some dispute between the parties as to the probative value of extrinsic circumstances in construction of the provisions of the trust agreement. However, taking the view most favorable to the defendant, the court believes that the provisions of ¶ 5 of the instrument, without reference to extrinsic facts, set out a sufficient standard under the rule referred to above.

In *Ithaca Trust Co.* v. *United States, supra*, an appeal from denial of a charitable deduction sought under the provisions of what is now § 2055(a)(2), the Supreme Court held that an instrument creating a trust for the life of the decedent's wife, with a remainder to certain charities, but which permitted invasion of the principal of the trust to any extent "'that may be necessary to suitably maintain her in as much comfort as she now enjoys,'" contained a sufficient standard to permit deduction of the value of the charitable bequest. In so holding the court stated that:

> "* * * The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. * * * There was no uncertainty appreciably greater than the general uncertainty that attends human affairs." (p. 154).

The rule in the *Ithaca* case was that the limitation on the invasion of the corpus of a trust in favor of the life bene-

ficiary was sufficiently certain if it provided that such invasion could be made only to sustain the life beneficiary in the manner to which she had been accustomed at the death of the settlor. This rule is still the law. *Commissioner* v. *Sternberger's Estate, supra,* at 199; *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 598 (1949). It is applicable to the instrument at hand.

In the construction of an instrument such as is presented by this case, the court cannot regard the terms therein as having been expressed in a void, wholly disjointed one from the other, but must read the provisions as a whole in arriving at the settlor's intent. The provision in the instrument creating the trust which provides for the invasion of the corpus thereof is extensive. It permits invasion of the corpus in the sole discretion of the trustee. In the entire context of the document, this must be taken to mean that no party other than the trustee may exercise the right to determine if an invasion of the corpus should be made. This grant of power is not, however, unbridled nor without restraint. Rather it is provided by the settlor that, in determining whether such power shall be exercised, the trustee:

> "* * * shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *."

This language indicates that the corpus of the trust is not intended to be subject to invasion to satisfy the whim and notion of the life beneficiary, but rather that her welfare, comfort, contentment and happiness are to be determined with relation to that standard of living to which she had

been accustomed at the time of the settlor's death. This criterion, imposed upon the exercise of the power to invade, is determinable and may be expressed in money. It satisfies the requirements of 26 U.S.C.A. § 2055 and the regulations adopted pursuant thereto. *Ithaca Trust Co.* v. *United States, supra.*

In the exercise of the granted power the trustee is required to preserve a fair balance between the interests of the life beneficiary and those of the remaindermen, and in such actions it is subject to judicial review and control. Thus there was "* * * established an ascertainable, external and judicially enforceable standard and * * * the trustees, in exercising such power, were limited by such standard and the supervision and control of the courts of Kansas in the exercise of their equity powers." *United States* v. *Powell*, 307 F. 2d 821, 828 (10th Cir. 1962).

Having determined that the standards set out in the trust agreement governing the exercise by the trustee of his power to invade the corpus were sufficiently certain, there remains the question whether, at the time of the settlor's death, the circumstances then existing were such that the likelihood of that power ever being exercised prior to the termination of the trust was highly improbable. With regard to this question, the court finds from the undisputed facts that at the date of the settlor's death his widow was possessed of a personal estate more than twice the size of that constituting the corpus of the trust; that this estate alone produced income in excess of that required to maintain the widow's standard of living, such that the size of her personal estate increased during the period between her husband's death and her own; that she received outright a bequest of better than $100,000 from the settlor's estate; and that her standard of living was modest. These were matters which the trustee was

directed by the settlor to consider. Under these circumstances, the court finds that the possibility of invasion of the corpus by the trustee, considered as of the date of the settlor's death, was surely so unlikely as to be negligible. This is all that the law requires.

There is no dispute among the parties as to the amount of the refund to which plaintiffs would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiffs' motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered.

Dated at Kansas City, this 23rd day of December, 1966.

Chief Judge

(Signed) Arthur J. Stanley, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 614

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY AND THE BOATMEN'S NATIONAL BANK OF ST. LOUIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this federal estate tax case is whether the trustee's power to invade the corpus of a trust includible in the assets of an estate in behalf of the decedent's widow is so broad that the estate may not have a charitable deduction for the value of the charitable remainder interest in the trust.

The decedent, Frank E. Washburn, created an inter-vivos trust, the income of which was payable to himself for life, to his wife thereafter, and finally to his sister, should she survive either the decedent or his wife. Upon the death of the wife and the sister, the trust was to terminate and the proceeds paid one-sixth each to four private individuals and two charita-

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ble institutions. (Pet. A1–A2.) The Commissioner of Internal Revenue denied to the estate of the decedent a charitable deduction under Section 2055(a)(2), Internal Revenue Code of 1954,[1] for the value of the residual charitable interests in the trust because of the power (Pet. A2–A3) given to the trustees to invade trust corpus for the "comfort, welfare, contentment, and happiness" of the decedent's widow, a purpose which was to be made "paramount to the conserving of assets in said Trust."

The deficiency was paid, a refund claim was filed and denied, and this suit for refund followed.[2] The district court entered a summary judgment for petitioners. The court of appeals reversed, holding that the estate was not entitled to the charitable deduction.

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[1] SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

* * * * * * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * * *

[2] Petitioners are the trustee of the trust and the administrator of the estate (Pet. App. A3 n. 1).

The decision below is correct. There is no conflict of decisions or other basis for further review.

1. This case is controlled by *Merchants National Bank* v. *Commissioner,* 320 U.S. 256. Under regulations approved by this Court in *Merchants Bank, supra,* 320 U.S. at 260, and in *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 597–598 n. 2, if a trust is created for both a charitable and a private purpose, the charitable deduction is available only insofar as the value of the charitable interest at death is "presently ascertainable, and hence severable from the noncharitable interest." Treasury Regulations on Estate Tax (1954 Code), Section 20.2055–2(a).

In *Merchants Bank,* remainders to charity were subject to a disinterested trustee's power to invade principal for the benefit of testator's widow, 67 years old at his death and of substantial independent means, if the trustee, in its "sole discretion", deemed it "wise and proper" to invade principal for the widow's "comfort, support, maintenance, and/or happiness." 320 U.S. at 257–258. The trust instrument in *Merchants Bank* also directed that the trustee "shall exercise its discretion with liberality" to the widow, who was the income beneficiary of the trust for life, "and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries," i.e., the charities. *Id.* at 258. This Court rejected the estate's claim for deductions based upon the value of the charitable remainders, concluding (*Id.* at 263) that the trust provisions authorizing the invasion of corpus contained no "standard fixed in fact and capable of being

stated in definite terms of money", see *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. The Court said (320 U.S. at 262, 263):

> The salient fact is that the purposes for which the widow could and might wish to have the funds spent do not lend themselves to reliable prediction. * * * Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. [Emphasis supplied.]

The trust instrument in the present case contains provisions that are indistinguishable from those which defeated the deduction in *Merchants Bank.* It provides for the invasion of principal by the trustee to satisfy the widow's (Pet. App. A2) "'comfort, welfare, contentment and happiness.'" It states that the trust (*ibid.*) "is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness" of the widow, and that the widow's (*ibid.*) "enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees * * *." Thus the court of appeals properly held (Pet. App. A4–A8) that *Merchants Bank,* supra, controls.

Petitioners cannot avoid the principle of *Merchants Bank* by reliance on *Ithaca Trust Co.* v. *United States, supra* (see Pet. 8–17), which holds only that a power

of invasion in behalf of a private beneficiary the benefits of which cannot exceed the standard of living to which the private beneficiary had been accustomed during the decedent's life is sufficiently fixed to permit valuation of a charitable remainder exclusive of the potential private use of trust principal. Although the present trust does contain a standard of living clause, that limitation on invasion is expressed only in the conjunctive with the broader language found in the *Merchants Bank* trust. The court of appeals recognized that the trust instrument (Pet. App. A6) "contains language similar to the invasion-of-principal clauses in both *Ithaca* and *Merchants Bank*" and concluded that (*Id.* A9) "where an instrument contains both a broad and a narrow standard of invasion, the broad standard should be given effect." That conclusion adopted the reasoning of other courts of appeals in similar cases (see *Union Trust Co.* v. *Tomlinson,* 355 F. 2d 40 (C.A. 5); *State Street Bank and Trust Co.* v. *United States,* 313 F. 2d 29 (C.A. 1)) and, as the court below observed (Pet. App. A9), "to do otherwise would require the court to ignore the broader language."

2. The Kansas authorities on which petitioners rely (Pet. 17–33) do not bring the trust language at issue here within the rule of *Ithaca Trust.* The court of appeals rejected this interpretation of Kansas law after careful analysis of petitioner's contention (Pet. App. A9–A13),[3] and there is nothing in this case to

[3] The court of appeals specifically rejected petitioners' reliance on *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d. 359, the state case principally relied on by petitioners here (Pet. 25–30;

take it beyond the rule that this Court does not ordinarily review a lower court's interpretation of local law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Sims* v. *United States*, 359 U.S. 108.

Furthermore, the court below properly distinguished its earlier decision in *United States* v. *Powell*, 307 F. 2d 821 (C.A. 10) (Pet. App. A10–A13) on the ground that in the instrument there the power of invasion for the "welfare", "comfort", and "happiness" of private beneficiaries was limited to a standard-of-living measure because of the context in which that language appeared, particularly an additional provision directing the trustee to exercise the power "with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828. Since *Powell* and the present case represent constructions of trust instruments according to their separate and appreciably different terms, there is no occasion for certiorari in the different results reached in the two cases.

Pet. App. A9–A10.) That decision merely held that a beneficiary, whose right to trust income depended upon a showing that her funds had become depleted within the meaning of the trust instrument, was entitled to that income upon a showing that her personal resources failed to provide her a standard of living comparable to that to which she had been accustomed. 311 P. 2d at 366–367. Thus the Kansas court decided only that the testator's expression of intent to provide for the "comfort and happiness" of his daughter meant *at least* that the daughter was to benefit from the trust when her other resources did not provide her with her customary standard of living. It did not consider whether the use of the word "happiness" provided for support beyond her accustomed standard of living.

3. Contrary to petitioners' contention here (Pet. 33–35), the court below properly denied their motion to dismiss the Government's appeal as untimely. Their position is predicated on the fact that the Government's notice of appeal was filed within sixty days after the district court's entry of judgment rather than within sixty days after the filing of the district court's opinion which announced the granting of petitioner's motion for summary judgment.

The judgment directing the United States to pay a stated sum to the taxpayers was not signed by the district judge or filed until June 1, 1967.[4] Petitioners' effort to transmute the district court's opinion into a judgment, entry of which begins the running of the time for appeal, ignores the requirement of Rule 58, Federal Rules of Civil Procedure, that "every judgment shall be set forth on a separate document." The district court in the present case did precisely what the rule requires when it entered judgment on June 1, 1967, and the notice of appeal filed on July 28, 1967, was therefore timely. Rule 73(a), Federal Rules of Civil Procedure (abrogated as of July 1, 1968); see, also, Rule 4(a), Federal Rules of Appellate Procedure.[5]

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[4] We have printed that judgment as an appendix to this response. The opinion granting the motion for summary judgment is printed as Appendix D to the petition, pp. A27–A35.

[5] Although immaterial, petitioners incorrectly state (Pet. 35) that the amount due them was known by both parties upon entry of the district court's opinion. Correspondence between the parties, extending over several months between December 23, 1966, and the entry of judgment on June 1, 1967, evidenced an area of disagreement regarding the amount. See attachments to the Government's memorandum in opposition to appellees' motion to dismiss appeal, which was filed in the court below and is part of the record here.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MELVA M. GRANEY,
LOUIS M. KAUDER,
Attorneys.

NOVEMBER, 1968.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil No. KC–2259

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY, AND THE BOATMEN'S NATIONAL BANK OF ST. LOUIS, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

The Court having considered the parties' respective motions for summary judgment and the affidavits, and briefs and arguments of counsel in support thereof, and having entered its Memorandum of Decision herein granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment, it is in conformity therewith:

ORDERED, that plaintiffs have judgment against defendant for the principal amount of $15,436.09, with interest thereon at six per cent according to law.

Dated at Kansas City, Kansas, this 1st day of June, 1967.

ARTHUR J. STANLEY, JR.,
Chief Judge
United States District Court.

Filed June 1, 1967.

CHARLES W. CAHILL, *Clerk.*

Approved as to form by:

ROBERT B. LANGWORTHY,
Attorney for Plaintiffs.

NEWELL A. GEORGE,
Attorney for Defendant.

U.S. GOVERNMENT PRINTING OFFICE: 1968